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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 183

AXEL HAWKINSON,

Petitioner and Appellee below,

VS.

GEORGE GASTON JOHNSTON,

Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MAURICE J. O'SULLIVAN,

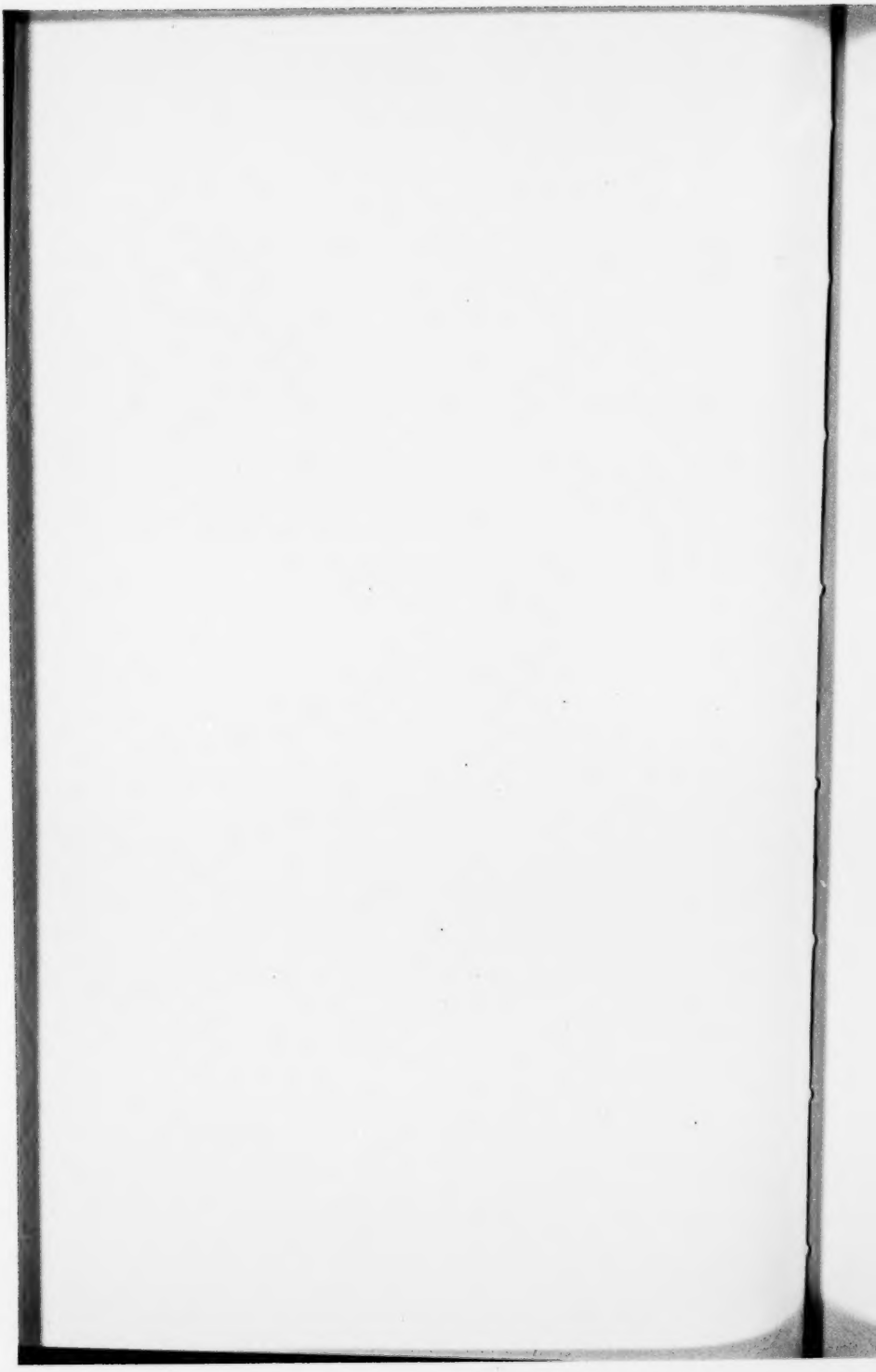
J. FRANCIS O'SULLIVAN,

700 Gloyd Building,
Kansas City, Missouri,
Attorneys for Petitioner.

LEO T. SCHWARTZ,

JOHN M. P. MILLER,

Kansas City, Missouri,
Of Counsel.



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OCTOBER TERM, 1941.

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AXEL HAWKINSON,

Petitioner and Appellee below,

VS.

GEORGE GASTON JOHNSTON,

Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Axel Hawkinson, respectfully shows to this Honorable Court:

I.

Summary and Statement of the Matter Involved.

1. A final opinion and decision of the United States Circuit Court of Appeals for the Eighth Circuit, was entered on April 23, 1941, in the cause entitled George Gaston Johnston, Appellant, vs. Axel Hawkinson, Appellee (Tr. 112-124).

2. Petitioner is a Royal Vice Consul of the Kingdom of Sweden (Tr. 63). Plaintiff, Johnston, introduced parts of petitioner's deposition to show this, ostensibly as an admission against interest, (Tr. 62-63), although his complaint pleaded (Tr. 1) only diversity of citizenship for jurisdictional purposes and did not rely on Section 371 (8), Title 28, U. S. C. A. relating to jurisdiction of ambassadors, vice consuls, etc. Petitioner for more than twenty-five years has been so recognized by exequaturs of the Department of State of the United States of America, and is aggrieved by said final opinion in that,

3. Contrary to the usual course of Federal judicial proceedings the opinion improperly adjudged and so permanently records that a *prima facie* case of fraud in connection with a compromise release was established against him (and that the District Court erred in directing a verdict in his favor) (Tr. 116-117) by reason of a mere inference first originated in the opinion and drawn from an asserted incomplete answer to a question in his deposition which was propounded but abandoned and which petitioner was neither directed nor even given opportunity to answer, as shown by the record (Tr. 88, fol. 120). It prejudicially reflects on petitioner's personal and official standing, and pointedly ignores applicable Federal Rules of Civil Procedure (Tr. 130) and nullifies

them for the Eighth Circuit if trial courts in this circuit follow it, as they are obligated to do.

4. Trial was (Tr. 10, 15, 24) on the third count (Tr. 4) of the complaint, for claimed deficiencies in quarterly rent payments made from 1929 to 1939, under a 99-year lease. Petitioner denied the indebtedness and (Tr. 12-15) pleaded a written release, dated June 16, 1937, whereby plaintiff, for $1,000.00 cash and two notes for $500.00 each, released and compromised the claims asserted and reduced the rent for a two-year period from October 1, 1937 to $800.00 per annum, payable quarterly. All (Tr. 31, last Par.) payments thereunder were made promptly. Plaintiff filed reply (Tr. 18) May 2, 1940, long after answer, then first alleging the release was procured by claimed false representations that an adjustment of the rent was necessary or defendant would be forced into bankruptcy; that defendant was "broke" and could not be forced to pay any back rent except voluntarily and would make no payments and plaintiff would get nothing unless he compromised. Plaintiff alleged the release was void and without consideration. Plaintiff testified (Tr. 57) that his own attorney procured petitioner's consent to compromise only after petitioner expressly refused to see plaintiff or his attorney again. The District Court directed verdict for petitioner because no evidence of fraud was shown in the release and ruled that mere proof of assets without any evidence of liabilities (or proof of absence thereof), did not establish solvency of petitioner, nor falsity of any statement that he was "broke". The District Court followed Missouri law, under which proof of liabilities as well as assets is required to show solvency, which is held to be the ability to pay one's debts from assets in the ordinary course of business. (See cases, Brief, Page 19, Par. 3).

5. The opinion (Tr. 107) states:

> "The motion for directed verdict by the defendant at the close of the plaintiff's evidence was general, but the ground of decision clearly appears in the declaration of the court in connection with its ruling. The court was of the opinion that the plaintiff was precluded from having any recovery because he was estopped by the settlement and release of June 16, 1937. The court stated: * * *
>
> > 'I have observed the evidence very carefully and have made inquiries myself in the trial to find out if there has been any showing here that anything Mr. Hawkinson said was not true. He said he was broke. Well, what proof is there that he was not broke? There is proof here that he had $26,000.00 approximately, stock of that value in the Building and Loan Association. There is proof here that he had a half interest in certain partnership assets which amounted to about $29,000.00. A half interest would be about $15,000.00, a little less. There is proof that he had assets of $40,000.00. But you do not show that a man is not broke by showing what his assets are. * * *'
>
> Thus it appears that the court reached the conclusion that the plaintiff's proof that defendant had assets of large value was insufficient to sustain the issue on plaintiff's part because the plaintiff had not also shown that the defendant had no debts offsetting the assets. The court stated, 'One can not prove that a statement that I am "broke" is untrue until he proves not only the assets but the liabilities, and there is nothing here to show what Mr. Hawkinson's liabilities were.' "

6. Parts of petitioner's deposition taken under Federal Rules of Civil Procedure number 26 were introduced as asserted admissions against interest. The only material part of the record discloses (Tr. 88, fol. 120):

"Mr. Close: If the Court pleases, I have some record evidence that I will offer to save time. Page 60 of the deposition of Mr. Axel Hawkinson, taken on April 6, 1940: (Reading)

'Q. What was your financial worth as of June, 1937?

Mr. Close: I will ask the reporter to mark this sheet as Plaintiff's Exhibit A.

(The document was thereupon marked by the reporter as Plaintiff's Exhibit A.)

Q. Mr. Hawkinson, I am handing you a sheet designated as Plaintiff's Exhibit A, and so marked by the reporter, and ask you to tell me what that is, if you will.

A. This is a list prepared by the party that handles my income tax, and attached to my 1937 income tax return—a list of real estate owned by Mrs. Hawkinson and myself.' "

7. The important question decided adversely to the contention of the petitioner, is stated in the opinion (Tr. 116, last Par.):

(a) "Our study of the record has persuaded that in construing the plaintiff's testimony the court failed to accord all reasonable intendments and inferences favorable to plaintiff. We think the inquiry propounded to defendant, 'What was your financial worth as of June, 1937?' clearly apprised the defendant that the matter inquired of was the matter involved in the lawsuit. He must have known that the question was directed to the allegation of the pleading that he had falsely represented himself to be 'broke'. When he answered the question as to what he was worth by producing the showing of assets, a fair and reasonable inference would be that such was his worth in the only sense relevant to the issue on trial.

> If by reason of undertakings or debts his real worth was different from what he disclosed, the facts were peculiarly within his knowledge and he should have made it known. He was not asked what his assets were, but what he was worth. If he meant his response to be only partial, he should have said so. The plaintiff's testimony on the issue was prima facie sufficient to falsify defendant's representation that he was 'broke' and the ruling to the contrary was erroneous."

8. The opinion states further:

> "* * * It appears that the question was propounded to defendant, 'What was your financial worth as of June, 1937?', and in response the defendant produced his income tax return for 1937, including schedules of assets. The return was the joint return of husband and wife but individual transactions of capital gains and losses by defendant himself were listed on the part of the return appearing in this record as Exhibit B. * * *"

Thus the entire opinion rests solely on an unwarranted assumption and inferences first drawn therein, based alone on the question relating to financial worth, propounded but not answered because it was nullified and abandoned by interposition of another question before opportunity for answer was allowed.

9. Petitioner's attention was not directed (Tr. 88) to any failure to answer. No proceedings followed under Rule 37 (a) to require answer. (See cases Brief, Page 19, Par. 4).

10. Petitioner, in court when the deposition was read, was not interrogated by plaintiff under Rule 43 (b) —(See cases Brief, Page 20, Par. 4 (b))—, although the trial court requested plaintiff (Tr. 104-105) to show what evidence indicated falsity of any representation by defend-

ant (Tr. 104). The theory first originated in the Circuit Court of Appeals was not then advanced nor even mentioned (Tr. 105).

11. The opinion assumes, without support of the record, that petitioner produced his income tax return in response to the abandoned question. On that unjustified assumption alone, inferences of partial answer; non-disclosure; no liabilities; false statements and ultimately of fraud, are built. All of these inferences drawn for plaintiff on which to rest a *prima facie* case of fraud are denied both by the record and by express affirmations of the complaint.

12. Plaintiff (Tr. 1-5) sued for $27,500.00 on his first count; for $6,000.00 on his second; approximately $8,920.00 (including interest) on his third (which was tried) and for $8,044.24 for taxes on his fourth count or a total of $50,464.00. Only about $3,000.00 of this accrued between 1937 and the date of suit. The first two counts were dismissed on motion, (Tr. 10) but the appeal time had not expired on April 6, 1940, when the deposition was taken. Tax receipts were filed before trial (Tr. 15) so the fourth count was dismissed as being moot. The liabilities asserted by the complaint would consume all assets shown. A contingent continuing liability existed on the lease for rent and taxes.

13. The opinion establishes a "fact based upon an inference, instead of seeking to draw an inference from an established fact." Compare: *Pape* v. *Aetna Casualty Co.*, (Mo. App.) 150 S. W. (2d) 569, l. c. 572, subd. 2, 3.

14. The Circuit Court of Appeals, Eighth Circuit, reversed the District Court and remanded the case for a new trial. A petition for rehearing (Tr. 125) was filed May 6, 1941, and overruled (Tr. 139, fol. 138) without opinion on May 9, 1941.

15. An order was entered on May 20, 1941, staying the issuance of mandate for thirty days to permit petitioner to apply for this writ (Tr. 140).

16. The opinion is reported 119 Fed. (2d) 110, and printed, Transcript pages 112 to 123.

II.

Jurisdiction.

1. Jurisdiction is discretionary, under Title 28, Section 347, U. S. C. A. Under Sections 341 and 342 of the same Title, original (but non-exclusive) jurisdiction is conferred on this Court, in cases wherein vice consuls are a party.

Petitioner disclaims any right to and requests no special consideration as vice consul. The facts are stated for the information of the court in the full exercise of its proper discretion, under all the circumstances shown by the record.

Los Angeles Brush Mfg. Corp. v. *James,* 47 S. Ct. 286, 272 U. S. 701, 71 L. Ed. 481, held that even a writ of mandamus will issue if required to restrain lower courts from nullifying rules of procedure promulgated by the Supreme Court. The Circuit Court of Appeals pointedly ignored applicable Federal Rules of Civil Procedure Number 26, 37 (a) and 43 (b) duly called to its attention (Tr. 130). The unjustified inference first originated in the Circuit Court of Appeals, contrary to the usual course of judicial proceedings, that a (Tr. 116-117) *prima facie* case of fraud in connection with a compromise release was established against petitioner, by mere inference, from an asserted failure to fully answer a question propounded in a deposition, but which was abandoned and which petitioner was neither directed to nor given opportunity to answer (Tr. 88, fol. 120) and where no action was taken

under Rule 37 (a) to require answer, and plaintiff did not interrogate defendant under Rule 43 (b), and where the point originated in the opinion was never raised in the trial court, (Tr. 104-105) and prejudicially affects petitioner personally and as Vice Consul of Sweden, (Tr. 63) all furnish special and important reasons for exercise of the power of this Court to review.

Petitioner is convinced this case comes within all limitations pointed out in *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922, and therefore properly calls for decision by this Court of last resort.

III.

Questions Presented.

Did the Circuit Court of Appeals for the Eighth Circuit err in refusing to consider and apply applicable Federal Rules of Civil Procedure duly called to its attention (Tr. 130) and in ruling that the failure to answer an abandoned question (Tr. 88, fol. 120) in petitioner's deposition (taken under F. R. C. P. No. 26) and introduced as an asserted admission against interest created an inference establishing a submissible *prima facie* case of fraud in the absence of any supporting evidence, particularly where defendant's attention was not directed to any alleged failure to answer; no opportunity to answer was given; no proceedings followed under Rule 37 (a) to require answer, and where defendant, although present in Court was not interrogated by plaintiff under Rule 43 (b), and where the point on which the decision is based first originated in the Circuit Court of Appeals and such ruling permanently records and prejudicially reflects on petitioner personally and officially as Royal Vice Consul of the Kingdom of Sweden?

IV.

Reasons Relied On for the Allowance of the Writ.

The Circuit Court of Appeals, Eighth Circuit, departed from the accepted and usual course of judicial proceedings in important matters of Federal law and recognized Federal practice and ignored applicable Federal Rules of Civil Procedure so as to call for an exercise of this Court's power of supervision, in the following respects:

1. In ruling that an inference from non-disclosure should be drawn where parts of defendant's deposition (taken under F. R. C. P. No. 26) was read as an admission against interest, because of asserted failure to fully answer an abandoned question when opportunity to answer was not extended and defendant's attention was not directed to any failure to answer it, and no action was taken under Rule 37 (a) to require an answer, and defendant was in court but was not interrogated under Rule 43 (b).

2. In adjudging that such inference alone without other evidence, constituted substantive proof of facts required by Missouri law to establish a *prima facie* case of fraud through misrepresentation of solvency, which was pleaded by plaintiff to avoid his own compromise release.

3. The importance of the fundamental general public questions of the right of an inferior court to nullify the Federal Rules of Civil Procedure, duly called to its attention, by utterly disregarding them and in ruling that a *prima facie* case of fraud justifying submission was established without any evidence but only by a mere inference from an asserted failure to completely answer a question in a deposition, which was abandoned by interposing

another question, is inherent and obvious in the decision (Brief, Pages 18-19, Par. 1-4), and conflicts with Missouri law.

4. The decision conflicts with those on the same matters decided by the Circuit Court of Appeals for the 2nd, 4th, 6th and 7th Circuits, as cited and discussed in Brief, Page 22, Par. 5.

5. It conflicts with the well established rule that while an inference from silence may add persuasive force to the evidence of the adversary, it is never potent to supply independent evidence of a fact unproved by other evidence (Brief, Page 22, Par. 6).

6. It directly conflicts with decisions of this court, cited and discussed in Brief, Page 23, Par. 7.

7. It conflicts with the well settled rule that no inference may reliably be drawn from premises which are uncertain; nor may legitimate inferences be drawn from other inferences, nor presumptions indulged which rest on the basis of other presumptions (Brief, Page 23, Par. 8).

8. It conflicts with the Missouri and Federal rule that substantive evidence and more than a mere scintilla, is required for submission (Brief, Page 24, Par. 9).

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a Writ of Certiorari be issued under seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of George Gaston Johnston, Appellant, vs. Axel Hawkinson, Appellee, No. 11879, to the

end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States; and that the findings of said Circuit Court, to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

Axel Hawkinson, Petitioner
By Maurice J. O'Sullivan,
J. Francis O'Sullivan,
700 Gloyd Building,
Kansas City, Missouri,
Attorneys for Petitioner.

Leo T. Schwartz,
John M. P. Miller,
Kansas City, Missouri,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1941.

No......

AXEL HAWKINSON,

Petitioner and Appellee below,

VS.

GEORGE GASTON JOHNSTON,

Respondent and Appellant below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported 119 Fed. (2d) 110, and appears in the record at pages 112 to 123.

II.

JURISDICTION.

The petition (ante page 1) states the grounds on which the jurisdiction of this Court is invoked. For brevity, that statement is not here repeated.

III.

STATEMENT OF THE CASE.

The petition, under the heading "Summary and Statement of Matters Involved," (ante pages 2 to 8), sets forth a full statement of the case. For brevity, that statement is not here repeated.

IV.

SPECIFICATIONS OF ERROR.

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in remanding the case below, where the District Court (Tr. 104-108) directed verdict for defendant at the close of plaintiff's case because of the absence of evidence required by Missouri law to establish fraudulent misrepresentations of solvency relied on by plaintiff to avoid a compromise release, and in holding (Tr. 116-117) that a submissible *prima facie* case of fraud was established, by a mere inference, first drawn in the opinion, from an asserted failure to fully answer a question in a deposition (Tr. 88) taken under Rule 26, (which was not answered because the question was nullified and abandoned by interposition of another question), where petitioner's attention was not directed to any alleged failure to answer it and no opportunity for answer was given, especially where no proceeding followed under Rule 37 to require answer and where defendant, although present in court, was not interrogated by plaintiff under Rule 43 (Tr. 104-108).

2. The decision is contrary to the usual course of judicial proceedings and pointedly ignored applicable Federal Rules of Civil Procedure numbered 26, 37 (a) and 43 (b), duly called to the Court's attention (Tr. 130) and nullifies them for the Eighth Circuit.

3. The decision conflicts with the well-established rule that a verdict may not rest on a mere inference based on non-disclosure in the absence of any other evidence, and in holding (Tr. 116-117) that such inference constituted substantive proof of facts required by Missouri law to establish a *prima facie* case of fraud through misrepresentation of solvency, which was pleaded by plaintiff to avoid a compromise release.

4. The decision conflicts with the rule declared by this Court that an inference based on non-disclosure may not be substituted for substantive proof of facts required to establish a *prima facie* case for the party carrying the burden of proof.

5. The decision conflicts with the well-settled rule that no inference may reliably be drawn from premises which are uncertain; nor may legitimate inferences be drawn from other inferences, nor presumptions indulged which rest upon the basis of another presumption.

6. The unjustified inference of fraud, based on asserted failure to fully answer a question asked but abandoned in a deposition, which inference first originated in the Circuit Court of Appeals, contrary to the usual course of judicial proceedings, and in nullification of Federal Rules of Civil Procedure No. 26, 37 (a) and 43 (b), prejudicially affects petitioner personally and officially as Vice Consul of Sweden.

V.

SUMMARY OF ARGUMENT.

1. Inferior Federal Courts may not nullify Federal Rules of Civil Procedure by disregard and draw inferences contrary to their letter and spirit.

2. Inference equivalent to substantive evidence of *prima facie* fraud may not rest alone on an asserted incomplete answer to an abandoned question in a deposition taken under Rule 26, where opportunity to answer was not given and no proceedings followed under Rule 37 (a) to require answer, and defendant present in court was not interrogated under Rule 43 (b).

Such ruling is contrary to the usual course of judicial proceedings and on the record here unfortunately prejudicially affects petitioner officially as Royal Vice Consul of Sweden.

3. The District Court in directing verdict for petitioner followed Missouri law in ruling that proof of solvency requires evidence of liabilities or their absence to show ability to pay debts from assets in the usual course of business.

4. Plaintiff may not establish a *prima facie* case by studiously avoiding Federal Rules of Civil Procedure to develop the facts, and then claim an inference of fraud through non-disclosure by propounding and abandoning a question in a deposition taken under Rule 26, where no opportunity was given to answer and no action was taken under the Rules to require answer.

5. The opinion conflicts with decisions of other Circuits holding that affirmative evidence is required to sustain the burden of proof and that it is not met by absence of evidence.

6. While an inference from non-disclosure may strengthen other evidence, it is never potent to prove a fact of which there is no evidence.

7. The opinion conflicts with decisions of this court holding that a failure to testify cannot supply any fact not reasonably supported by substantive evidence in the case and that an inference from non-disclosure cannot be substituted for substantive proof of facts required to establish a *prima facie* case.

8. No inference may be drawn from uncertain premises, nor may legitimate inferences be drawn from other inferences.

9. Verdict should be directed unless the burden of proof is met with substantial evidence.

10. The opinion erroneously rests on a fact based on inference, instead of seeking to draw an inference from an established fact.

VI.

ARGUMENT.

Two questions of paramount general public importance tend to overshadow even the erroneous prejudicial result suffered by petitioner. They are:

(1) May any inferior Federal Court nullify applicable Federal Rules of Civil Procedure directly called to its attention (Tr. 130), by utterly disregarding them and then draw an inference contrary to the spirit and letter thereof and not supported by the record? (Cf. *Los Angeles Brush Mfg. Corp.* v. *James,* 47 S. Ct. 286, 272 U. S. 701, 71 L. Ed. 481.

(2) May a Circuit Court of Appeals first originate an inference and declare it equivalent to substantive evidence of fraud when the inference is based solely on an asserted incomplete answer to an abandoned question submitted in a deposition (Tr. 88, fol. 120) where no evasion was attempted by petitioner and he was neither directed to nor given an opportunity to answer, and no proceedings followed under Rule 37 (a) to require answer and where the matter was never raised in the trial court and petitioner was not interrogated under Rule 43 (b)?

These questions obviously inhere in the opinion. The result is contrary to the usual course of judicial proceedings in courts of the United States. The opinion unfortunately as well casts an unjustifiable reflection on petitioner officially as Royal Vice Consul of Sweden, as plaintiff saw fit to introduce parts of petitioner's deposition showing his official position, as an alleged admission made by petitioner against his interest. The theory of that as an admission, is no more novel than the theory of asserted admission of fraud by inference, disclosed in the opinion below.

The facts are stated in the petition, and for brevity are not again reviewed. Brief reference is made to the cases and principles which apply.

(3) The District Court correctly followed the Missouri law in directing verdict for petitioner. It requires a showing of liabilities as well as assets to establish solvency. Solvency under Missouri law is ability to pay one's debts from assets in the ordinary course of business. Debts have to be shown before ability to pay is determinable.

Jack v. *O'Meara,*
(Mo.), 122 S. W. (2d) 897, 903, subd. 4.
Akin v. *Hull,*
222 Mo. App. 1022, 9 S. W. (2d) 688, l. c. 690.
Vandeventer v. *Goss,*
116 Mo. App. 316, 91 S. W. 958, 961.

Compare, *Fort Dodge Hotel Co.* v. *Bartlett,* 8th Cir., 119 Fed. (2d) 253, l. c. 258, subd. 10-16, an opinion of other judges of the same circuit, filed the same day as the opinion here. There controlling state law is followed. It is held proof of necessary elements is of the "very substance" of the case of a party carrying the burden of proof and the obligation is imposed to establish every fact essential to make out a cause of action. The same rule applies, of course, to an affirmative defense.

(4) The Circuit Court of Appeals pointedly refused to apply applicable Federal Rules of Civil Procedure numbered 26, 37 (a) and 43 (b), duly called to its attention (Tr. 130).

(a) Defendant's attention was not directed to any failure to answer the question on which the entire opinion is based (Tr. 88). If plaintiff desired the question

answered, petitioner was entitled to a reasonable opportunity for answer before plaintiff interposed another question. It was incumbent upon plaintiff to call petitioner's attention to any alleged failure to answer. The minimum requirements of fair play alone, independent of the Rules, demands at least that much. If answer was refused, full remedy was provided by Rule 37 (a).

Vendola Corp. v. *Hershey,*
1 F. R. D. 360.
Sibbach v. *Wilson & Co.,*
85 L. Ed. 349, adv. op. 61 S. Ct. 422.
Lewis v. *United Air Lines,*
31 F. S. 617.
Etten v. *Kaufmann,*
25 F. S. 215, subd. 6.
Coca Cola Co. v. *Dixi-Cola Lab.,*
30 F. S. 275, subd. 1-3.

Even before the present rules, it was held in *Fahrney & Sons* v. *Ruminer,* 7th Cir., 153 Fed. 735, l. c. 738, that no inference may be drawn from a direct refusal to answer questions before a Special Master, where the opposing party failed to press the matter in court to require an answer. It is there held the record stood just as if the questions were never propounded.

(b) Defendant was in court when parts of his deposition were introduced but was not interrogated by the plaintiff under Rule 43 (b), although the trial court specially requested plaintiff (Tr. 104-105) to indicate what evidence disclosed falsity of any representations made by petitioner. The theory first originated in the decision of the Circuit Court of Appeals, was not advanced nor mentioned (Tr. 105). Under these circumstances, the inferences, if any, would be exactly opposite that drawn.

National Bondholders Co. v. *McClintic,*
4th Cir., 99 Fed. (2d) 595, l. c. 600.
Article—1 F. R. D. l. c. 346.
Article—1 F. R. D. l. c. 522.

Masonite Corp. v. *Hill,* 154 So. 295, 95 A. L. R. 157, l. c. 161, holding that an adverse inference may arise against the party carrying the burden of proof if he fails to introduce explicit evidence capable of production.

See also:

Manchester Bank of St. Louis v. *Harrington,*
(Mo.), 199 S. W. 242, 249.

Resort to any of the many methods of discovery created by the present rules would have taken the matter out of the realm of speculation. Plaintiff studiously sought to keep from destroying his case by avoiding developing the facts. The ambuscade was saved for appeal. Approval of that system denies jurisprudence as the science of justice and tends to destroy confidence in the courts.

(5) The decision directly conflicts with decisions of the Circuit Courts of Appeal of the Second, Fourth, Sixth and Seventh Circuits, as follows:

W. F. Corbin & Co. v. *United States,* 6th Circuit, 181 Fed. 296, l. c. 304, 305, holding that a presumption from silence may strengthen other evidence but without other evidence there is no basis for such presumption.

See also,

Smith v. *Pennsylvania R. Co.,*
2nd Circuit, 239 Fed. 103, l. c. 104, 105.

N. Y. & Cuba Mail S. S. Co. v. *Cont. Ins. Co.,* 2nd Circuit, 117 Fed. (2d) 404, 408, subd. 4, that burden of proof is not met by absence of evidence from the opponent but affirmative proof is required.

Owens Bottle-Mach. Co. v. *Kanawha Banking & T. Co.*, 4th Circuit, 259 Fed. 838, l. c. 842, 843, holding that where the burden of proof rests on plaintiff, a failure to produce evidence furnishes no inference against defendant whose case rests on a denial.

Fahrney & Sons v. *Ruminer*, 7th Circuit, 153 Fed. 735, l. c. 738, cited *supra.*

Such an inference is insufficient to establish fraud or reliance thereon.

Compare:

DeRoode v. *Sheppey*,
6th Cir., 32 Fed. (2d) 634, subd. 1, 5, 6;
Holman v. *Gulf Refining Co.*,
5th Cir., 76 Fed. (2d) 94, subd. 1, 2, 4;
Ponder v. *Delauney*,
14 S. Ct. 1208, 154 U. S. 651, 38 L. Ed. 1092;
Cleaveland v. *Richardson*,
10 S. Ct. 100, 132 U. S. 318, 33 L. Ed. 384.

(6) The opinion conflicts with the well-established rule that while an inference from silence may give persuasive force to evidence of the adversary it is never potent to supply independent evidence of a fact unproved by other evidence.

Diel v. *Mo. Pac. Ry. Co.*,
37 Mo. App. 454, l. c. 459.
Allen West Commission v. *Richter*,
228 S. W. 827, 286 Mo. 691, subd. 6, 7.
Chicago, M. & St. P. Ry. Co. v. *Harrelson*,
14 Fed. (2d) 893, l. c. 896 (C. C. A. 8).
Shidloski v. *New York, C. & St. L. R. Co.*,
333 Mo. 1134, 64 S. W. (2d) 259, l. c. 263, 264.
Frohman v. *Lowenstein*,
303 Mo. 339, 362, 260 S. W. 460, l. c. 466.

(7) The opinion conflicts with applicable decisions of this court, as follows:

Mammoth Oil Co. v. *United States,* 275 U. S. 13, 52, 48 S. Ct. 1, 72 L. Ed. 137, 151 ruling that a failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case.

See also extensive *Annotation,* 70 A. L. R. 1326, and cases reviewed.

Hanson v. *Eustace,* 2 How. (U. S.) 653, 11 L. Ed. 416, holding an inference from non-disclosure cannot be substituted for substantive proof of facts required to establish a *prima facie* case for the party carrying the burden of proof. Such inference is not sufficient even though non-disclosure follows a direct notice to produce.

See also:

Northern Ry. Co. v. *Page,*
274 U. S. 65, l. c. 74, 47 S. Ct. 491, 71 L. Ed. 929, l. c. 932.

(8) The opinion conflicts with the well settled rule that no inference may be reliably drawn from premises which are uncertain; nor can legitimate inferences be drawn from other inferences, nor presumptions indulged which rest upon the basis of another presumption. The inference of answer by producing income tax return and of evading full answer by non-disclosure of liabilities is denied by the record (Tr. 88, fol. 120). The premise for the inference is non-existent, and not merely uncertain.

Phillips v. *Trav. Ins. Co.,*
288 Mo. 175, 231 S. W. 947.
United States v. *Ross,*
92 U. S. 281, 23 L. Ed. 707.

Manning v. *John Hancock Mut. L. Ins. Co.*,
100 U. S. 693, 25 L. Ed. 761.
Looney v. *Metropolitan R. Co.*,
200 U. S. 480, 50 L. Ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627.
Pennsylvania R. Co. v. *Chamberlain*,
288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819.

(9) The opinion conflicts with the Federal and Missouri rule, that substantial and more than a mere scintilla of evidence is required to support a verdict and that a verdict should always be directed unless the burden of proof is sustained by substantial evidence.

Small Co. v. *Lamborn & Co.*,
267 U. S. 248, 254, 45 S. Ct. 300, 303, 69 L. Ed. 597.
Penn. Ry. Co. v. *Chamberlain*,
288 U. S. 333, 53 S. Ct. 391, 395, 77 L. Ed. 819.
Transamerican Freight Lines v. *Marcrome Art Co.*,
(Mo. App.) 150 S. W. (2d) 547, 551, subd. 3, 4, 5.
Grange v. *C. & E. I. Ry. Co.*,
334 Mo. 1040, 69 S. W. (2d) 955.
Scotten v. *Met. Life Ins. Co.*,
336 Mo. 724, 81 S. W. (2d) 313.

(10) The opinion erroneously establishes "a fact based upon an inference, instead of seeking to draw an inference from an established fact."

Pape v. *Aetna Casualty Co.*,
(Mo. App.) 150 S. W. (2d) 569, l. c. 572, subd. 2, 3.

The record and opinion insistently presents important questions of general public importance, decided contrary

to the usual course of judicial proceedings, which should be finally determined by this Court.

We respectfully and earnestly submit that the case justifies and impels the issuance of this Court's writ of certiorari.

MAURICE J. O'SULLIVAN,

J. FRANCIS O'SULLIVAN,

700 Gloyd Building,
Kansas City, Missouri,
Attorneys for Petitioner.

LEO T. SCHWARTZ,

JOHN M. P. MILLER,

Kansas City, Missouri,
Of Counsel.